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STATUTORY AUTHORITY AND THE ATTORNEY GENERAL'S STATEMENT

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A. Background on the Statutory and Regulatory Requirements of the NPDES Permit Program

Section 402(b) of the CWA requires a State seeking EPA approval for NPDES authority to submit copies of all State statutes and regulations which will form the legal foundation for its permit program. EPA must review and evaluate the adequacy of these legal authorities to ensure their consistency with the Act and the NPDES and pretreatment regulations set out at 40 CFR Parts 122-125 and 403. The following sections of the Act are directly applicable to State programs: 304(i), 308(c), 309(c) and (d), 316(a), 318(c), 402(b), (d), (g), (h), and (j), 403(a) and 405(c).

States must have adequate statutory and regulatory authority to administer the NPDES program. The State must have authority at least as stringent as the federal requirements cited at 40 CFR 123.25 (including the pretreatment program). States can have additional authorities providing that they are not less stringent than those required by the federal program. State law can be more stringent, but States cannot use more stringent provisions to "trade off" for provisions that are less stringent than federal requirements. All State statutes and regulations must be in full force and effect by the time the program is approved. Of course a State seeking a modification to its program must have adequate legal authority to implement the modification.

Where a State is requesting program approval, Section 402(b) also requires that the Attorney General, (AG) or the chief

attorney in State agencies having benefit of independent legal counsel certify that in his or her opinion, the laws of the State provide adequate authority to carry out the program. (EPA regulations describe the specific content of these statements in 40 CFR 123.23.) This Attorney General's Statement must include a discussion of the State's legal basis for conducting each aspect of the program and address any significant differences between State and federal law.[1]/ The Attorney General's statement must cite to the specific statutory and regulatory provisions that provide the legal authority for each program element. However, citations alone are not adequate; the Attorney General must explain how each citation provides the requisite authority. These explanations need not be extensive where the provisions are clear on their face. Where appropriate to clarify authority, the AG should also cite to judicial decisions and other interpretations of State authority.

Whenever State regulations are cited, the underlying statutory authority for the regulation should also be cited. If administrative regulations are based upon a broad statutory provision, such as the "power to implement a pretreatment program," then the Attorney General must explain that such regulations do not violate any applicable doctrines under State law (e.g., the delegation of legislative authority to State administrative agencies).

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[1]/ In order to resolve any significant differences between State and federal law, the Attorney General must identify those federal requirements which have no corresponding provisions in State law as early in the program development process as possible.

There is no explicit requirement that a single State Agency have authority to operate the entire program. Although centralization of NPDES program functions is generally preferable, the CWA allows program functions to be managed by more than one State agency. However, if management of the program is shared, it cannot result in a gap in the State's total authority. The agencies, taken together, must have full authority to administer the program. In addition, each agency must have all necessary legal authority to control those discharges within its jurisdiction. The Attorney General should indicate which State agency will be responsible for performing each program task and how the several agencies will coordinate their activities.2/

Before developing the statement, it is suggested that the AG's office carefully review drafts of the program description so that the statement will address the activities which the State intends to undertake. In many instances, the adequacy of the legal authority will depend upon the approach the State agency intends to adopt. For example, a State may have adequate authority to regulate industrial users through State-issued permits; but the State agency has elected to administer the pretreatment program through POTWs (like the federal program). In this case, the AG must interpret the State's pretreatment

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2/ States contemplating this type of bifurcated management should take particular note of the conflict of interest provisions contained in section 304(i)(2)(D) of the Act (see, subsection B(1)(j), infra). Each agency having or sharing authority to issue, or in some way act upon permits, must satisfy the conflict of interest provisions.

authority in view of the program the State plans to administer.

The Attorney General's statement must be signed by the Attorney General or a representative of the AG who is authorized to sign and can bind the State by so doing. Alternatively, the Statement may be signed by an independent legal counsel. To qualify as independent legal counsel, the signatory must have full authority to represent the State agency in Court on all matters, including defending actions against the State and bringing actions to enforce against program violations.

A State must also submit an Attorney General's statement if it proposes to modify its program to add a new program component (i.e., pretreatment, federal facilities, or general permits). In these cases, the AG statement need only address authority for the component being sought, unless broader discussion is appropriate to explain the authority fully. An AG's statement may often be necessary at other times the State requests program modification, such as when the State amends or revises its statutory or regulatory authorities. In addition, EPA may require a supplemental Attorney General's statement to be prepared whenever it has reason to believe that circumstances surrounding a State program have changed (see, 40 CFR 123.63). For example, if State judicial decisions raise questions about the adequacy of State authorities, EPA can request a supplemental AG Statement to resolve ambiguities.

When the program approval or modification request is submitted, the Regional Administrator, in conjunction with the Director of the Office of Water Enforcement and Permits,

and the Associate General Counsel for Water, must make an independent determination as to the adequacy of State legal authorities. (Section 402(b) of the Act provides, in part, that "...[EPA] shall approve each such submitted program unless [it] determines that adequate authority does not exist..." to perform certain functions set forth in section 402(b).) The State Attorney General's certifications cannot be deemed to be absolutely dispositive of the sufficiency of a State's legal authority. However, EPA will give the Attorney General's statement the greatest possible weight when the adequacy of the State's program and legal authorities is assessed. Where the plain wording of statutory or regulatory authorities appears to conflict with federal requirements, EPA cannot approve the program unless the authority is revised or the AG demonstrates that the authority is adequate. If the AG's Statement leaves authority ambiguous, EPA will request clarification.

B. State Statutory Authority and the Contents of the Attorney General's Statement

The following discussion addresses the statutory authority required for State program approvals. Each of these topics must be discussed by the Attorney General in his or her statement. This discussion tracks the Model AG's statements for NPDES and pretreatment that EPA has developed. These models are reproduced in Volume II. For new programs and full program legal reviews, State authority must cover all topics addressed in this Chapter. Where States are modifying programs to add a new component, it is only necessary to look at the section dealing with that program element.

This Chapter also identifies many of the areas which frequently create stumbling blocks to program approval, and explains what constitutes adequate State authority. However, these problems areas will not be the only ones considered during EPA's review of the legal authorities. EPA will give added scrutiny to any State authority which appears to conflict with the requirements under section 402 and the federal NPDES regulations.

As discussed above, the Attorney General's statement must also cite to regulations providing the State's authority to administer the program. These regulatory requirements are discussed in Chapter 4.

(1) NPDES Requirements

(a) Authority to Issue Permits

(1) Existing and new point sources

The scope of State NPDES programs must be at least as broad as EPA's program. States must have authority to require all point source discharges, existing as well as new, to obtain permits.[3]/ States may not exclude types of point

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[3]/ EPA's NPDES regulations create an exception to the general requirement that States regulate all discharges. NPDES States need not have authority to regulate discharges on Indian lands. The inability to regulate these activities is not considered a partial program and is not an impediment to EPA approval (40 CFR 123.1(h)). In fact, EPA cannot authorize a State to regulate discharges on Indian lands unless the State demonstrates such authority. See also, EPA's Policy for Administration of Environmental Programs on Indian Reservations (11-8-84) and State Jurisdiction over Indians Living on Tribal Lands, General Counsel's Opinion No. 77-6 (5-31-77).

sources, as defined in the Act and EPA regulations, from the permit requirement.[4]/ For example, some States in the past have sought to exclude certain categories, types, or sizes of point sources from the basic requirement to obtain a permit. Other States have attempted to "grandfather" or exempt discharges already in existence, or provide automatic permits for existing dischargers. Such schemes are inconsistent with the CWA.

It is also not permissible for States to develop provisions for de jure permits (i.e., the discharger is authorized to discharge if, after a certain time period, the permitting authority has not acted on the discharger's permit application). This approach would allow issuance of a permit without notice and comment and without the permitting authority determining the appropriate permit limits. No facility may discharge without a valid NPDES permit issued in accordance with State regulations equivalent to the federal NPDES regulations unless it has been specifically excluded from regulation. However, States may allow NPDES permits to be continued after expiration where the permittee has filed a timely and complete application.

State authority to require dischargers to obtain NPDES permits must be based on the existence of a "discharge of pollutant, from a point source, into waters of the United States" (as these terms are defined in section 502 of the Act and 40 CFR 122.2 of the NPDES regulations). State

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4/ EPA regulations at 40 CFR 122.3 list several types of discharges as being excluded from the NPDES permit requirements. Most of these exemptions represent discharges that EPA has determined not to be point sources.

provisions that seem to require an additional demonstration, such as a showing of pollution, a public nuisance, harm to the environment, or violations of effluent or water quality standards, are not valid unless the State can demonstrate that they are in fact consistent with the CWA. Generally, where the State law requires an NPDES permit for any discharge that causes or may cause pollution, or otherwise predicates the regulatory requirements on such provisions, the State law does not meet federal requirements and must be changed.

State law requiring discharge permits also must provide adequate authority to issue permits regulating the disposal of pollutants into wells (see, CWA section 402(b)(1)(D)). This authority must enable a State to prevent pollution of ground and surface waters and protect public health and welfare by preventing or permitting discharges to wells. An approved State Underground Injection Control (UIC) program under section 1422 of the Safe Drinking Water Act will satisfy this requirement.

(2) Waters of the State

The State law must define "Waters of the State" as broadly as the NPDES regulations (see 40 CFR 122.2). This definition is very broad and encompasses virtually all surface waters. The State cannot limit the scope of the NPDES program by exclusions for waters "wholly on private property," or "non-continuous or intermittent" water bodies, etc., unless the State can demonstrate that those exclusions are not inconsistent with the Act. For example, some waters wholly on private property are considered waters of the U.S. because

of connections to interstate commerce, such as making them available for recreational use by the public. (There may also be pretreatment-related concerns with the definition of waters of the State. See Part B(2)(a), below.)

(b) Authority to Deny Permits in Certain Cases

No discharger has a right to an NPDES permit and State law may not provide dischargers with such a right. States also must have authority to deny permits. This authority cannot be limited by requiring the State to demonstrate "pollution" or similar environmental impact.

In addition, States must have authority to prohibit permit issuance in certain circumstances. The Act prohibits permit issuance in the four circumstances listed below; States must have the authority to deny permits in these circumstances even though the discharge would not violate any applicable effluent guideline or water quality standard. The following discharges are prohibited:

- Discharges which would conflict with an approved Area Management Plan (section 208(e));
- Discharges of radiological, chemical, or biological warfare agents, or high level nuclear wastes (section 301(f));
- Discharges which, in the judgment of the Army Corps of Engineers, would substantially impair anchorage and/or navigation (section 402(b)(6)); and
- Discharges where EPA has objected to the State's draft/proposed permit.

The federal rules also prohibit the issuance of permits in other situations (listed in §122.4). State law must provide

similar authority.

(c) Authority to Apply Federal Standards and Requirements to Direct Dischargers

(1) Technology-based Effluent Limitations Guidelines

Section 402(b)(1)(A) of the CWA requires States to have authority to adopt and apply federally promulgated, technology-based effluent limitations guidelines in their NPDES permits. The Attorney General's statement must describe the mechanism by which these standards will be adopted into State law and applied to dischargers. If the State must independently develop and promulgate its own effluent standards and limitations, they must be at least as stringent as the federal standards and the State must cite to the controlling statutory and regulatory authorities. States must require compliance with technology-based requirements no later than the deadline required under federal law. The applicable technology-based limitations are described below.

(i) Industrial Permittees

Pursuant to section 301(b) of the Act, existing point sources, other than publicly owned treatment works, are required to achieve pollutant reductions resulting from the application of the following federal effluent standards:

- By July 1, 1977, effluent limitations which require the application of the best practicable control technology currently available (BPT) for all pollutants;
- By July 1, 1984, effluent limitations which require the application of the best available technology economically achievable (BAT) for toxic pollutants, including the elimination of discharges of all pollutants where appropriate;
- By July 1, 1984, effluent limitations for conventional

pollutants which require the application of the best conventional control technology (BCT); and

By July 1, 1987, effluent limitations which require the application of the best available technology economically achievable (BAT) for nonconventional pollutants.

These requirements apply even where the permittee's discharge consists solely of sanitary waste equivalent in character to domestic sewage.

(ii) Municipal Permittees

State Agencies must require publicly owned treatment works (POTWs) to achieve secondary treatment no later than July 1, 1977 (Section 301(b)). However, section 301(i) allows POTWs to request an extension of the compliance deadline if they were awaiting construction grant awards and requested the extension in 1978. POTWs granted compliance extensions must comply with secondary treatment (and water quality-based limits, see below) no later than July 1, 1988. The State's authority to require compliance by POTWs may not be limited, such as by being dependent on funding availability.

(2) Water Quality-Based Effluent Standards

States must have authority to apply water quality standards, which are developed under State law and approved by EPA,[5/] in permits. These standards must be imposed in permits whenever they are more stringent than applicable technology-based limitations (CWA 301(b)(1)(C)). Compliance with water quality-based permit limits must be required by July 1, 1977. If new or revised water quality-based permit limits are developed

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5/ In the event a State fails to submit a water quality standard, or the standard as submitted or subsequently revised does not meet the requirements of section 303 of the Act, EPA is authorized to develop the standard in lieu of the State.

after that date, the State must have authority to require compliance within a reasonable time. The State's water-quality standards must implement the total maximum daily load allocations (TMDL) established under section 303(d), and the continuing planning process under section 303(e) of the Act. 6/ States also must have authority to impose in permits any more stringent water quality-based effluent limitations developed by EPA under section 302 of the Act where necessary to achieve water quality standards. Only EPA may establish water quality-based effluent limitations under section 302; this provision does not apply to State programs, except to the extent that States must ensure compliance with such limits. States may not incorporate provisions similar to those in section 302(b)(2) into State law. Those provisions are integral to the section 302 standard-setting process and have no application to water quality standards established under section 303.

(3) New Source Performance Standards

States are required to impose federal new source performance standards. These standards reflect the greatest degree of effluent reduction achievable through the application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where applicable, a no-discharge requirement. States must require compliance with these standards upon commencement of discharge

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6/ The State process for developing water quality standards and TMDLs must be consistent with 40 CFR Part 131. These State procedures are not reviewed as part of the NPDES program approval or review except to the extent they are implemented through the NPDES permit process.

(see 40 CFR 122.29). In order for these standards to be imposed correctly, the State's definition of "new source" must be at least as stringent as EPA's (see, 40 CFR 122.2 and 122.29(a) and (b)).

(4) Toxic Pollutant Effluent Standards

States must have authority to apply federal toxic pollutant effluent standards under Section 307(a) to new and existing sources. Compliance with these standards must be achieved by the date specified in the standard (which is generally, no more than one year after promulgation). These standards appear in 40 CFR Part 129. Although new standards must apply regardless of their presence in existing NPDES permits, States also must have authority to modify permits to insert toxic pollutant limitations.

(5) Best Professional Judgment (BPJ) Effluent Limitations

EPA cannot approve a State program unless that State is authorized to fully implement all aspects of the NPDES program, even where an applicable federal effluent standard or limitation has not been promulgated (i.e., the State must be able to develop permit limitations based upon the best professional judgment (BPJ) of the permitting authority). When establishing BPJ limitations, the permitting authority must consider the statutory factors for the appropriate level of technology set out in section 304(b) of the Act (see also, 40 CFR 125.3(d)). In cases where EPA has promulgated an effluent guideline but the guideline does not address a particular pollutant present in the discharger's effluent, the State must

have authority to use a combination of effluent guidelines and BPJ to establish appropriate permit limitations for the entire discharge.

(6) Ocean Discharge Effluent Limitations

When permitting discharges into the territorial seas, States must have the authority to apply additional requirements derived from the ocean discharge criteria promulgated by the Administrator under section 403 of the Act (see, 40 CFR Part 125, Subpart M). Note that all discharges beyond the territorial seas (3 miles offshore) are outside State jurisdiction and are permitted by EPA.

(7) Compliance Schedules

States must have authority to incorporate compliance schedules in NPDES permits. These schedules must require compliance with applicable requirements no later than statutory deadlines. States may not impose or modify compliance schedules where those schedules would be inconsistent with federal requirements (such as extending beyond a statutory deadline).

(8) Variances

The CWA and EPA regulations authorize variances from applicable effluent limitations in several instances. States are not required to allow dischargers variances from such limitations, although they may do so. However, if a State authorizes variances, the State standards must be at least as stringent as federal requirements.

States also may not allow for variances that are not authorized under federal law, whether in the form of adjustments

to the permit or a separate State rulemaking that modifies the standard for a particular permittee. For example, a State could not allow for variances from water quality standards based upon economic impact, since these variances are not available under the Act. State procedures for acting on variances also must be consistent with federal requirements. Thus, States may not grant certain variances (e.g., Fundamentally Different Factors) although they may have authority to incorporate an FDF variance granted by EPA.

Variances from technology-based limitations for industrial facilities are authorized under CWA sections 301(c) (for non-conventional pollutants based upon economic impacts); 301(g) (for nonconventional pollutants where there are no water quality impacts; 301(k) (compliance extensions for innovative technology); 301(i)(2) (delay in POTW construction); and 316(a) (thermal). EPA also allows variances based upon fundamentally different factors at the permitted facility. POTWs are eligible for variances under section 301(h) (ocean discharge) and compliance extensions under section 301(i) (federal funding for POTW construction).

(d) Authority to Limit Permit Duration

The CWA establishes maximum permit terms of not more than five years. Permits may, of course, be issued with shorter terms. Notwithstanding the five year authorized term, a permit based upon BPT may not be issued with an expiration date later than the applicable BAT/BCT statutory deadline.

Under federal law, where a permit expires through no fault of the permittee, it is administratively continued if the

permittee filed a timely and complete application for a new permit. Although not required by the CWA, States may allow the terms of expired permits to be administratively continued in a similar manner. The Attorney General must assure EPA that authority to continue expired permits is consistent with the State's Administrative Procedure Act or other procedural laws, as well as the State's own NPDES regulations (see, 40 CFR 122.6).

(e) Authority For Entry, Inspection, and Sampling; and Applying Monitoring, Recording, and Reporting Requirements to Direct Dischargers

The Attorney General must indicate whether State law authorizes the Director to impose recording, reporting, monitoring, entry, inspection, and sampling requirements, and explain how these requirements will be imposed. The State must have authority to enter and inspect, at reasonable times, any premises on which an effluent source is located or records required by the CWA are kept. In practice, this means the States must be able to inspect any NPDES permittee. Thus, a State exclusion for private residence is generally not authorized since a private residence may be a discharger regulated by the program or may be a depository for records required to be kept under federal law.

(f) Authority to Require Notice of Introduction of Pollutants into Publicly Owned Treatment Works

States must have the authority to require POTWs to provide notice of the introduction of pollutants to the POTW by industrial users. This authority is fully discussed in the pretreatment section of this chapter (see Part B(2)(c), below at page 3-27).

(g) Authority to Issue Notices, Transmit Data and Provide Opportunity for Public Hearings

A State must have authority for public participation in the issuance of NPDES permits that is equivalent to federal requirements. The CWA contains several provisions encouraging or requiring public participation in a State's permit development process. Detailed requirements for public involvement are outlined in 40 CFR Part 124. These include authority for public notice and comment and opportunity for public hearing on all permits. It is expected that most States will choose to cover the detailed provisions for public participation in administrative regulations rather than statutory authorities. However, State statutory authority must be broad enough to allow development of regulations consistent with federal requirements. The State must ensure that draft permits and fact sheets be available for public review and comment. The notice and comment procedures also must apply when the State proposes to modify, terminate, and revoke and reissue permits. The State authority must ensure consideration of all relevent public comments before the State decides to issue or modify a permit, and a responsiveness summary of the significant comments must accompany the final permit notice.

A State may not limit the applicability of these public participation procedures. Thus, a State law which limits hearings or opportunities to comment to aggrieved applicants will not comply with the public participation requirements of the Act. Similarly, the opportunity to request a public hearing (non-adjudicatory) must be available to the citizenry as well as to the permit applicant. If held, a hearing must be

convened before rather than after a final decision on the permit.

(h) Authority to Provide Public Access to Information

The treatment of confidential business information has been a troublesome area in State program approvals. Some State laws deny the permitting authority access to "confidential" or "proprietary" information. Other laws require only that such information be withheld from the public. Many of these restrictions are inconsistent with the CWA.

Under the CWA, States must allow public access to all information from permittees except confidential business information. However, certain information is not eligible for confidential treatment. All permits and information required in permit applications must be made available (although information not required by the permit application does not fall within this category). In addition, information constituting effluent data must be made public. EPA has defined effluent data very broadly to include any information necessary to evaluate the discharge, determine effluent limits, ascertain compliance and allow meaningful public comment on permits (see, 40 CFR 2.302). Thus, where permit limits are based upon the facility's production, production data could not be claimed confidential if it met the criteria in Part 2.[7]/

State laws must be consistent with these broad public access to information requirements. States also may not create restrictions on the use of such information, including effluent data,

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[7]/ Federal effluent guidelines are often calculated on a production basis.

(e.g., making information received from a discharger inadmissible in an enforcement action against the discharger). The State must have authority to disclose any information, even trade secret information, to EPA. EPA's use of such disclosures would, of course, be subject to the appropriate requirements for public access in 40 CFR Part 2. Furthermore, disclosure is subject to protective orders issued by a court or Administrative Law Judge.

(i) Authority to Modify, Revoke and Reissue or Terminate Permits

States must be authorized to modify, revoke and reissue, or terminate permits for cause. Section 402(b)(1)(C) defines cause to include the following:

- Violation of any conditions of the permit;
- Obtaining a permit by misrepresentation or failure to disclose all relevant facts; and
- Changes in circumstances which require either a temporary or permanent reduction or elimination of the permitted discharge.

A complete listing of authorized causes for permit modification is set out in 40 CFR 122.62, and causes for termination at 40 CFR 122.64. States may not authorize permit modifications for less stringent limits where these would not be allowed under federal law.

(j) Authority to Enforce the Permit and the Permit Program

State law must provide for adequate enforcement authority, including the ability to enjoin violations and bring both civil and criminal action for any violations of permits or the permit program. Other sanctions, such as the ability to bring actions for damages, are allowed, but they must be addi-

tional rather than substitutes for these enforcement remedies.

The NPDES regulations outline the enforcement capabilities which must be included in a State program (see, 40 CFR 123.27). A State must have authority to seek injunctive relief in two instances. First, the State must be able to immediately restrain any unauthorized activity endangering the public health or the environment. Second, it must have authority to sue to enjoin any threatened or continuing violations without first revoking the permit. State penalty authority must allow the State to seek civil penalties in the amount of at least $5,000 per day of violation, seek criminal fines (for willful or negligent violations) in the amount of at least $10,000 per day of permit violation, and seek criminal fines for knowing false representations or certifications, or knowingly rendering monitoring devices inaccurate, in at least the amount of $5,000 for each instance of violation. Other provisions in the Act relating to criminal sanctions which States are encouraged to provide include the following:

* Imprisonment - section 309(c) provides for maximum imprisonment of one year (or six months for false statements); and

* Additional penalties - section 309(c) provides for a doubling of maximum fines and imprisonment terms for "second offenders".

The Attorney General must describe the State Agency's enforcement options in detail, covering each of the above points. In addition, since federal law includes criminal sanctions for persons who willfully or negligently violate effluent standards or limitations, water-quality standards,

or permit conditions, the Attorney General must indicate whether criminal fines or imprisonment, based upon negligent conduct, is permissible under State law. The Attorney General must also describe any limitation or prerequisites to enforcement actions. Such restrictions will be carefully reviewed to determine whether State authority still meets federal minimum requirements.

States also cannot provide additional defenses or rights to dischargers where not authorized by federal law. Thus, a State could not allow a permittee to challenge its permit limits in an enforcement proceeding and State law that provided such an option would be inconsistent with the federal requirements. Similarly, a State could not restrict its enforcement by limiting the use of information in an enforcement action.

Administrative enforcement mechanisms, such as informal orders (not directly enforceable by a court), may be used as a first response to a violation, but are not an acceptable substitute for the above-described formal enforcement capabilities. Furthermore, if provisions for administrative compliance orders, requiring the cessation of violations of permit conditions or allowing the administrative assessment of penalties for violations, are present in the State's law, the Attorney General must indicate whether these procedures must be exhausted before the State Agency is permitted to seek civil or criminal penalties, or injunctive relief. Note that the NPDES regulations require that injunctions be available without prior permit revocation of permits (see, 40 CFR 123.27). Of course, the Attorney General should also

describe any additional enforcement remedies available to the State, including citations to supporting legal authorities.

State programs must allow for public participation in the enforcement process. The NPDES regulations allow States to choose one of two basic options. The first option is for State law to provide for intervention as of right in any enforcement action. States choosing this option may not place restrictions on this right, other than jurisdictional limits such as standing. Alternatively, where State laws allow permissive intervention in State actions, the State may agree not to oppose such intervention in any enforcement proceeding. (Although the NPDES regulations specify only that the State will not oppose permissive intervention where authorized under State law, EPA has interpreted this option as being available only when permissive intervention is possible.) Under this option, the State also must agree to investigate and respond to citizen complaints and publish all settlement agreements for a public comment period of at least 30 days. A third option available to States is a hybrid of the first two. For example, a State may allow intervention through a rule analagous to Rule 24(a)(2) of the Federal Rules of Civil Procedure and provide an assurance by the appropriate State enforcement authority that it will not oppose intervention under the State analogue on the ground that the applicant's interest is adequately represented by the State. Such a hybrid public participation approach is consistent with federal requirements, even though it does not clearly fit within either of the options outlined in the regulation. These requirements were first added in 1979. Thus many approved States do not yet have the required authority.

(k) Conflict of Interest: State Board Memberships

The CWA requires that no State Board, Agency or organization which approves or acts on NPDES permit applications or portions thereof, may include among its membership, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for an NPDES permit. "Significant portion of income" is defined in EPA's regulations as 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross income if the recipient is over 60 years of age and is receiving that portion of income as a pension retirement or similar arrangement (see, 40 CFR 123.25(c)). "Permit holders or applicants for a permit" do not include State Agencies or Departments. All State programs must have conflict of interest protections which are at least as stringent as those of the CWA.

This statutory prohibition against conflicts of interest has been a problem in a number of States. Some States require permitting boards to have representatives of the regulated public. Other State boards are elected and could include members who receive income from permittees. These States' approaches are inconsistent with the explicit language of the Act. States must either establish the federal conflict prohibition or the Board must delegate its permitting and enforcement powers to a position that is prohibited from conflicts. Some States have sought to avoid the prohibition through recusal on matters affecting the permittee. This alternative is also not acceptable.

(k) Incorporation by reference

Although States seeking NPDES program approval are required to adopt administrative regulations similar to EPA's, there is no legal prohibition against a State doing so through incorporation by reference. Clearly, it is preferrable to have specific State regulations that explain applicable requirements fully, but States may choose instead to have a short incorporating provision. If a State chooses to pursue incorporation by reference, the Attorney General must certify that such an incorporation is proper and enforceable under State law and includes all of EPA's regulations which are applicable to States. The Attorney General should also explain the form, if any, that such incorporation must follow under State law and explain how the rules meet those requirements. The Attorney General should indicate, by means of a list, those federal regulations which the State has incorporated and explain how the list was generated. The Attorney General should pay particular attention to any attempt to incorporate federal law prospectively, that is, to incorporate revisions to federal law which are yet to occur. Most State Courts have held such incorporations invalid as unconstitutional delegations of legislative power and State authority. EPA will closely review any attempts to incorporate State law prospectively.

(2) Pretreatment Requirements

(a) Authority to Apply Federally Promulgated Categorical Pretreatment Standards to Industrial Users

States seeking pretreatment program approval must have authority to impose pretreatment standards on all industrial

users of publicly-owned treatment works (POTWs). Pretreatment standards include the general and specific prohibited discharges listed in 40 CFR 403.5, local limits developed by POTWs, and federally promulgated categorical pretreatment standards found in 40 CFR Subchapter N.

A State must be able to apply and enforce these pretreatment standards directly against any owner or operator of any source subject to them. Where the State regulates all industrial users (IUs) itself, either through regulations or State-issued permits to all industrial users, the requirement that the authority operate directly should not be a problem. However, most States will administer the pretreatment program like the federal program - with POTWs being approved to regulate industrial users of their system and the State primarily overseeing the POTWs' efforts. In these cases, the State cannot rely upon the POTW to impose the pretreatment requirements; such requirements must apply to all IUs irrespective of POTW action. Thus, a State scheme that allows the State only to enforce against the POTW when the industrial user violates a pretreatment requirement is impermissible. Similarly, if the State must take an intermediate step, such as issuing an order with pretreatment requirements or revoking the POTWs approved pretreatment program (or permit issued under that program), prior to acting, the State's authority does not meet federal requirements. Of course, a State permit system would be adequate, even though the requirements would only be applicable once imposed in the permit, if the State issued permits to all industrial users.

It must also be clear that the State has authority to apply pretreatment standards to industrial users. Many State statutes only authorize the State to regulate discharges to waters of the State. Unless the term discharge is defined clearly to include indirect discharges, it is unlikely that such authority is consistent with federal requirements. Industrial users do not discharge to waters, but instead to the POTW's sewer system. This has been a common problem in State pretreatment submissions. States are cautioned that an easy remedy, such as defining discharge to include indirect discharges, may result in requiring all industrial users to obtain permits (under State law), a result which the State may not have intended or desired. In addition, such a definition may have the absurd result of requiring water quality standards for sewer lines.

(b) Authority to Apply Pretreatment Requirements in NPDES Permits for Publicly Owned Treatment Works

State Agencies must have authority to apply the following pretreatment requirements in terms and conditions of NPDES permits issued to POTWs:

- Compliance schedules for local POTW pretreatment program development (40 CFR 403.8(d));
- Conditions of an approved local program (40 CFR 403.8(c))
- A modification clause allowing the POTW's permit to be reopened to incorporate either an approved local pretreatment program, or a compliance schedule for developing a local program (40 CFR 403.10(d));
- Effluent discharge limitations to be enforced against industrial users (40 CFR 403.5); and
- Conditions of an approved removal credit (demonstrated percentages of pollutant removal) (see, 40 CFR 403.7, and subsection (d), below).

Most States should have adequate statutory authority to impose these conditions in NPDES permits as part of their NPDES authority. This will frequently be a general authorization to include appropriate conditions in permits. However, these authorities should be reviewed to ensure against inconsistencies that would prevent imposition of these conditions.

(c) Authority to Require Notice of Introduction of Pollutants into Publicly-Owned Treatment Works

States must have the authority to require POTWs to provide notice of the introduction of pollutants to the POTW by industrial users. CWA section 402(b)(8) specifically requires permits to contain conditions requiring notice of new or increased discharges from industrial users who would be subject to either section 301 or 306 of the Act if they were discharging directly. The State must also be able to require notice of the anticipated impact of such discharges. Most States laws should meet this requirement through their power to incorporate conditions into NPDES permits, although the authority must still be reviewed to ensure that there are no restrictions. Since the NPDES regulations (40 CFR 122.42(b)) require such notices, States with NPDES authority will generally have adequate authority to meet this requirement.

(d) Authority to Make Determinations on Requests for Local Pretreatment Program Approval and Removal Allowances

Unless the State chooses to assume responsibility for implementing local POTW pretreatment programs, State law must authorize the State Agency to approve or deny municipal requests for local POTW pretreatment programs. The State must have authority to follow procedures equivalent to EPA's, including

allowing for public notice and comment (see, subsection (h), below). Local programs may not be approved where the POTW lacks either the authority or the procedures to administer and enforce the program against industrial users.

Although not required by the CWA, States may allow POTWs to make adjustments to the categorical pretreatment effluent limitations placed on industrial users based upon the consistent pollutant removal achieved by the treatment works. States choosing to allow POTWs to request and receive removal credits authority must be able to follow procedures similar to those used for local program approval. States are not required to grant removal credits.

(e) Authority to Make Determinations on Categorization of Industrial Users, and Requests for Fundamentally Different Factors Variances

State law must also authorize the State Agency to make a determination as to whether or not the industrial user falls within a particular category or subcategory. The category determination allows the industrial user to know which categorical standard is applicable to its discharge. The Attorney General must also describe the requirements that the State Agency must follow in making category determinations. States should note that under federal law (40 CFR 403.6(a)(4)), States must provide industrial users the right to appeal the decision to EPA. States that cannot provide for such appeals are not authorized to make category determinations. In any instance where a State lacks the authority to make category determinations, EPA will make the determination.

States may also choose to develop authority to act on requests for fundamentally different factors (FDF) variances for industrial users, although States may choose not to allow such variances. Under federal law, States may not grant FDF variances, but may only deny or recommend approval to EPA. States also may not grant State FDF variances under their own authority, since these could make the program less stringent than the federal program. The Attorney General must describe the State's FDF requirements and procedures.

(f) Authority to Apply Recording, Reporting and Monitoring Requirements

States must have authority to require industrial users and POTWs to submit reports, keep records, and install, use, and maintain monitoring equipment. The Attorney General must explain that the State has authority to require each report identified in the general pretreatment regulations (40 CFR 403.12) (see also subsection (c), above). These include baseline monitoring reports, compliance reports, and periodic reporting by industrial users. POTWs and industrial users must be required to sample, respectively, their influents and effluents. The Attorney General also must describe the requirements which the State agency must follow in order to accomplish the above activities.

It must be clear that the State's reporting and monitoring provisions apply to indirect discharges and are not limited to direct discharges. For example, some States have authority that allows imposition of these requirements to "point sources" or to "discharges to waters of the State." These provisions

generally will not provide adequate authority. The term point source usually applies only to direct discharges; the problems with "discharge" under the pretreatment program are discussed above in Part B(2)(a) of this chapter. If the State statute contains such provisions, the State must demonstrate that they apply to indirect discharges as well.

(g) Authority to Apply Entry, Inspection and Sampling Requirements

State law must provide authority to enable authorized representatives of the State and POTWs with approved pretreatment programs to enter and inspect at reasonable times any premises of a POTW or of an industrial user where an effluent source is located or in which any records are maintained. This must include authority to review and copy any records required to be maintained, inspect any monitoring equipment, and sample any industrial user's effluent. As discussed above (subsection (f)), it is important to ensure that the State's authority applies to indirect dischargers. The Attorney General must describe the requirements which the State Agency must follow in order to accomplish the above activities.

(h) Authority to Issue Notices, Transmit Data, and Provide Opportunity for Public Hearings and Public Access to Information

States must have authority to provide public notice and comment on requests for local pretreatment program approval and for removal credit authority. States must also provide an opportunity for public hearing on these decisions and public notice of the final decision. These public notices and comment provisions are similar to those for NPDES permits (described

above at Part B(1)(g)), and State notice provisions must be equivalent in scope, including the interested public, affected States and governmental agencies.

States also must have authority to provide public access to information from permittees and industrial users. All information, other than confidential business information, must be available to the public. As with NPDES information, effluent data may not be claimed confidential (this authority is the same as for direct dischargers, discussed above at Part B(1)(h)). The public also must have access to requests for local program approval and comments thereon. Finally, the State must have authority to transmit any requested information to EPA. The Attorney General must describe the requirements which State Agency must follow in order to accomplish the above activities.

(i) Authority to Enforce Against Violations of Pretreatment Standards and Requirements By Industrial Users

States must have authority to enforce against violations of any pretreatment standard or requirement by industrial users. (Enforcement authority is also required against POTWs, but since the POTW's requirements are all inserted into its permit, the authority to enforce against permit violations is adequate - see Part B(1)(j) of this chapter.) Pretreatment standards are broadly interpreted (as discussed above in Part B(2)(a)) to include categorical pretreatment standards, the specific and general prohibitions in the pretreatment regulations, and local limits. Pretreatment requirements include all other regulatory provisions imposed upon industrial users, such as reporting requirements. States must have authority to enforce directly against violations of any of these provisions.

State enforcement authority must consist of both civil and criminal penalties (equivalent to those for NPDES permit violations) and injunctive relief authority. (Enforcement authority for NPDES State programs is discussed above at Part B(1)(j).) As with the NPDES enforcement authority, a State may not substitute other mechanisms for the required authorities.

States also must have authority to join the POTW as a defendant in any action against one of its industrial users for violations of pretreatment requirements. The CWA in Section 309(f) authorizes EPA to join the POTW where it fails to initiate an enforcement action after receiving notice from EPA of its intent to enforce against the violation. States must have an equivalent provision (see also 40 CFR 403.5(e)). Generally, methods of ensuring that industrial users comply with section 307(b) of the Act vary from State to State. For example, a State could issue permits to all indirect dischargers and have enforcement authority against all permit violations. However, where the State does not issue permits to all industrial users, it normally must have regulatory requirements that impose pretreatment requirements, and must have authority to enforce those regulations.

The Attorney General must discuss the State's options for ensuring compliance with these requirements and the authority therefor. In examining this authority, it is important that State enforcement authority be consistent with the chosen regulatory scheme. Review of the enforcement language should

also make sure that the various provisions are consistent with one another. For example, if the State's civil authority applies to standards and regulations, but the criminal provision applies to conditions and limitations, the criminal authority does not appear adequate to cover violations of regulations, especially given strict interpretation of criminal statutes.

Finally, the State law must include provisions allowing the State to seek injunctive relief restricting or prohibiting the introduction of pollutants into a publicly owned treatment works in the event a condition of a permit for the discharge of pollutants from such a treatment works is violated.

(j) Incorporation by Reference

See discussion of incorporation by reference in Part B(1)(1) of this chapter.

(3) Authority Over Federal Facilities

Prior to the 1977 Amendments to the CWA, States were not allowed to exercise NPDES jurisdiction over discharges by federal facilities. (See, EPA v. California State Water Resources Control Board, 426 U.S. 200 (1976)). In the 1977 Amendments, Congress declared that all federal facilities must comply with applicable State law, thus requiring States approved to administer the NPDES program to regulate federal facilities within the State. Consequently any State whose program was approved before 1977 must modify its program to cover these facilities. Generally, this means that the definition of "person" must be broad enough to encompass federal facilities.

The Attorney General must therefore certify that there are no barriers, prohibitions, or exclusions on regulating federal facilities.

(4) General Permit Requirements

(a) Authority to Issue and Enforce General Permits

General permits are administrative tools designed to assist the permitting authority in meeting the mandates of the CWA. Unlike individual permits, general permits are not written for a particular facility at a specific location, but instead cover multiple facilities in similar, but not necessarily identical circumstances. For this reason, general permits are more akin to a rulemaking proceeding than traditional licensing.

If a State intends to issue general permits, the State must have authority which would allow such permits, although it need not specifically reference them. The primary considerations will normally be whether State law requires individual permits or could be interpreted more broadly. The Attorney General must assure EPA that the State's permitting authority does not require individual permits for all sources, and that issuance procedures for general permits are consistent with State law.

(b) Incorporation by Reference

See discussion of incorporation by reference in Part B(1)(1) of this chapter.